



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/698,289	10/31/2003	David E. Wolf	205-011US2	1624
27791	7590	01/09/2008		
ALLISON JOHNSON, P.A. LAKE CALHOUN EXECUTIVE CENTER 3033 EXCELSIOR BLVD., SUITE 467 MINNEAPOLIS, MN 55416			EXAMINER YANG, NELSON C	
			ART UNIT	PAPER NUMBER
			1641	
			MAIL DATE	DELIVERY MODE
			01/09/2008	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

**Advisory Action
Before the Filing of an Appeal Brief**

Application No.

10/698,289

Applicant(s)

WOLF, DAVID E.

Examiner

Nelson Yang

Art Unit

1641

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 18 December 2007 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☐ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).

7. ☐ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

The status of the claim(s) is (or will be) as follows:

Claim(s) allowed: _____

Claim(s) objected to: 27, 42, 43, 45, 46 and 88.

Claim(s) rejected: 2-11, 13-19, 22, 24-26, 28-32, 38-41, 47, 56-65, 84-86, 89-92 and 2930.

Claim(s) withdrawn from consideration: _____

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____
13. ☐ Other: _____


LONG V. LE 01/07/07
SUPERVISORY PATENT EXAMINER
TECHNOLOGY CENTER 1600

Continuation of 11. does NOT place the application in condition for allowance because: applicant's arguments are not found persuasive. In particular, with respect to applicant's arguments on p. 5 that at no point does Schultz expressly teach surrounding a polymer matrix with a membrane, the Office notes that in column 6, lines 2-11, Schultz discloses that a receptor material may be immobilized to a gel forming polymer (polymer matrix) within the chamber, wherein the chamber is part of a capsule having a semi-permeable membrane (column 5, lines 50-56). Therefore, applicant's assertion is incorrect.

With respect to applicant's arguments to claim 13 on p. 6, and on p. 13-15, regarding the label being free-floating, the Office notes that only the receptors have been specified as being immobilized to the gel, and that analog-analyte molecules covalently bonded to dye molecules compete with the analyte for binding to the receptors, which would require that they be mobile. Therefore, applicant's argument is not found persuasive.

It is further noted that applicant argues on p. 8 that the system of Empedocles is nothing like the system of Schultz. The Office disagrees, as both the system of Empedocles and the system of Schultz are optical detection systems capable of detecting fluorescent labels in an assay system. It is unclear why the rejection of claim 41 is unwarranted as Schultz teaches a detector adapted to detect light emitted by skin, whereas Empedocles provides motivation for having multiple detectors, and not for having a detector adapted to detect light emitted by skin. It is noted that even though applicant has arbitrarily decided that the third detector is adapted to detect light emitted by skin, there is no reason why it could not be the first or second detector. Therefore, applicant's arguments are not found persuasive.

Applicant's argument on p. 9, with respect to claim 42, however, is found persuasive, and the rejection of claims 42-47 with respect to Schultz in view of Empedocles is withdrawn.

With respect to applicant's arguments to claim 56 on p. 11, Empedocles specifically teach a processor coupled to multiple detectors. Since applicant has not defined what a chip is, the term must be given its broadest reasonable interpretation, and therefore would read upon the device of Empedocles et al.

With respect to applicant's arguments on p. 11 with respect to claims 58 and 59 that the light source of Schultz is not adapted to transcutaneously excite a fluorophore and a detector adapted to transcutaneously detect light, it is noted that the very fact that the light source is above the skin and can excite the fluorophores indicates that it is capable of transcutaneously exciting the fluorophore. Furthermore, the fact that Schultz utilizes ultraviolet light, which can pass through the skin, indicates that the light source is adapted to excite the fluorophores transcutaneously. If applicant has some different definition of transcutaneous excitation, applicant is encouraged to provide said definition, and note where in the specification the definition can be found.

Applicant's argument with respect to Empedocles on p. 12-13 is not found persuasive, as the purpose of Empedocles is to provide motivation for providing multiple detectors, and not the type of detectors. Since applicant has not indicated why having multiple detectors would not work in the system of Schultz, and instead focuses on the types of detectors used, applicant's arguments are not found persuasive.

Applicant's argument on p. 16 appear to rely on applicant's previous arguments on p. 1-15, which have been previously addressed, and therefore are not persuasive.

With respect to applicant's argument on p. 18 that Zenhausern do not teach detection of fluorophores, the Office notes that Zenhausern teach fluorophore markers (para. 0021) and detectors for detecting said markers (para. 0029). Therefore, applicant's arguments are not found persuasive. Applicant further argues that there is nothing in Zenhausern that teaches or suggests that the detectors are capable of detecting fluorescent light. The Office again notes that Zenhausern teach the use of fluorescent labels and further teaches that the sensors are capable of being responsive to photophysical changes (such as changes in light) (para. 0034).

The Office is further unclear why Zenhausern would specifically describe the fluorophores and labels, if the fluorophores were not intended to be detected by the detectors, and request that applicant explain their logic, in order to better understand the arguments.

It is further noted that applicant appears to be arguing through the response that the prior art, and more specifically the secondary reference fails to teach the substance of the first reference. The Office notes that if the secondary references did, then they would anticipate the claims and therefore the claims would be rejected under 35 USC 102, and not 103.

It is further noted that applicant argues on p. 20 that Zenhausern and Schultz fail to teach a third detector adapted to detect light emitted by skin. It is noted that even though applicant has arbitrarily decided that the third detector is adapted to detect light emitted by skin, there is no reason why it could not be the first or second detector. Therefore, since Schultz teach a detector adapted to detect light emitted by skin, applicant's arguments are not found persuasive.

With respect to applicant's arguments that Zenhausern fails to teach a detector emitter array that includes a chip that includes three detectors and an excitation source, the Office notes that Zenhausern teaches a multiple sensor array (chip) (para. 0025) and a laser (para. 0077). Again, as discussed above, since applicant failed to define the term chip, in the specification, the term has been given its broadest possible interpretation.